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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-777

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AND THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES

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(Continued from outside of cover)

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To The Honorable Chief Justice and Justices Of The Supreme Court of the United States:

Pursuant to Rule 42(3) of the Rules of this Court, Associated General Contractors of America, Inc. (AGC) and the National Association of Home Builders of the United States (NAHB) hereby respectfully move for leave to file a brief *amicus curiae* in this case in support of the Petitioner, National Labor Relations Board. The consent of the Solicitor General has been obtained and has been filed with this Court. The consent of the attorneys for Respondent was requested on April 28, 1976, but no response has been received. A copy of such request has also been filed with this Court.

AGC is a national trade association representing 8,116 general contractors in the construction industry. NAHB is comprised of over 75,000 employers in the home building industry. As representatives for these employers, AGC and NAHB have a direct interest in the judicial resolution of federal labor law issues, particularly those decisions involving labor-management relations in the construction industry.

The issues raised by the instant case are of critical significance to those companies represented by AGC and NAHB in their working relationships with other enterprises involved in construction (owners, suppliers, subcontractors) and the labor organizations representing their employees. Moreover, the questions before this Court will necessarily involve consideration of the effect of certain labor organization practices to restrict the right of contractors to utilize new technology, increase productivity and adopt more efficient methods of construction. Petitioner will no doubt concentrate on the primary and secondary aspects of Respondent's conduct in the facts of this case. AGC and NAHB participation will focus on the adverse consequences to the construction industry and the nation resulting from

such conduct. Thus, AGC and NAHB respectfully submit that their contribution will assist the Court in recognizing the legal and economic significance of the case at bar.

WHEREFORE, Associated General Contractors of America, Inc. and the National Association of Home Builders of the United States respectfully move this Court for leave to file their joint brief as amici curiae in support of the position of the Petitioner, National Labor Relations Board.

Respectfully submitted,

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BRIEF OF AMICI CURIAE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AND THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES

INTEREST OF THE AMICI CURIAE

1. The Associated General Contractors of America, Inc. (AGC) is a national trade association consisting of 114 state and local chapters, including Puerto Rico, and represents 8,116 general contractors engaged in the construction industry. Construction is the largest industry in the United States, with a seasonally adjusted volume of 134 billion dollars for 1976. The members of AGC perform approximately 60% of the general contracting business throughout the United States.

2. The National Association of Home Builders of the United States (NAHB) represents 75,000 members of the home building industry in 614 state and local associations located throughout the United States and Puerto Rico. New private residential construction is projected to total over 63.5 billion dollars during 1976, 3.8% of the Gross National Product.

3. The members of AGC and NAHB are direct producers of gainful employment for numerous individuals, many of whom are represented by the building and construction trade unions. Both AGC and NAHB have a vital concern with any judicial interpretation which directly affects construction industry labor-management relations.

4. The importance that this case bears especially to the home building industry and to the American home buyer should not be underestimated. The NAHB's Research Foundation in its 1974 report on "builder practices," a national survey of 1600 builders on the characteristics and construction practices for all types of one-family homes, points to the fact that there is an increase within residential building of fabricated and pre-assembled building components with a resulting

increase in on-site construction productivity and lowering of home construction costs.

5. The issues presented in the instant case are of particular importance to AGC and NAHB. The contractor-members of AGC must necessarily rely upon subcontractors and the suppliers of construction materials and components if major construction projects are to be completed in an efficient and economical manner. Similarly, to obtain its goal of producing a decent living environment for all American families at the most reasonable cost possible, the members of NAHB must utilize advanced construction technology, including more efficient and productive work processes and improved building products, materials and components. The opinion of the Court below, if sustained, would directly inhibit the construction industry's ability to meet those objectives.

ARGUMENT

I.

THE LEGAL LIMITATIONS OF THE SECTION 8(e) CONSTRUCTION INDUSTRY PROVISO WERE EXCEEDED BY THE "WORK PRESERVATION" CLAUSE HELD LAWFUL BELOW

Within the last year, this Court stated in *Connell*[1] that "Congress limited the construction industry proviso

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[1] *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, AFL-CIO*, 421 U.S. 616 (1975).

to . . . [a] single situation, allowing subcontracting agreements only in relation to work done on a jobsite."[2] *Id.* at 630. The clear meaning of this language is that work preservation agreements between an employer and a union operate as an illegal product boycott when the union, as the result of that agreement, seeks to acquire work not designed to be done at the jobsite. The legislative history of this proviso to Section 8(e) supports fully this limitation.

The original Senate proposal for Section 8(e) would have outlawed hot cargo agreements only between labor organizations and common carriers.[3] However, the House version, the Landrum-Griffin Bill, prohibited such agreements with any employer.[4] A compromise on the two versions was reached during the Conference Committee's consideration of the two proposals.

[2]The construction industry proviso is the first proviso contained in Section 8(e), 29 U.S.C. § 158(e). Section 8(e) states as follows:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, expressed or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work *to be done at the site of the construction*, alteration, painting, or repair of a building, structure, or other work. . . . [emphasis added]

[3]S. 1555, 86th Cong., 1st Sess. § 707 (1959).

[4]H.R. 8400, 86th Cong., 1st Sess. § 705 (1959).

Senator Kennedy, describing the Conference Committee changes, stated that "the Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to *work to be done at the site* of the construction project."[5] (Emphasis added) Senator Kennedy also stated that:

> It should be particularly noted that the proviso relates only to the "contracting or subcontracting of work to be done at the site of the construction." The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.[6]

Similarly, in the Statement Of The Managers On The Part Of The House, it was reported that:

> [i]t should be particularly noted that the proviso relates only and exclusively to the contracting or subcontracting of work to be done at the site of the construction.[7]

The above-cited legislative history of the proviso represents the clear expression of Congress' intent as to its scope. While many legislators expressed opposing views on this subject after the enactment of the proviso,[8] Justice Brennan, speaking for the majority in

[5]Report of Conference Committee on S. 1555, 86th Cong., 1st Sess. §16413 (1959), reprinted in *II NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959*, at 1432 (1959) (hereinafter cited as *1959 Legis. Hist.)*

[6]II *1959 Legis. Hist.* at 1433. *See also id.* at 1721 (remarks of Representative Thompson).

[7]I *1959 Legis. Hist.* at 943.

[8]*See, eg.*, II *1959 Legis. Hist.* at 1815 (Remarks of Senator McNamara).

National Woodwork Manufacturers Association v. National Labor Relations Board, 386 U.S. 612 (1967), properly noted that "these statements could represent only the personal views of these legislators, since the statements were inserted in the Congressional Record after the passage of the Act."[9]

The legislative history recited above comports also with this Court's recent discussion in *Connell* of the scope of the construction industry proviso.[10] Applying this Court-approved view of the scope of the proviso to the instant case,[11] it is clear that Respondent's concerted activities were in support of an attempt to enforce its "work preservation" clause impermissably beyond the protection of the proviso. The work being sought by Respondent was never intended "to be done at the site of the construction."[12]

In addition, any reliance on *National Woodwork* to support the "work preservation" clause herein is misplaced. In *National Woodwork* the dispute involved the general contractor and work which was not required by business contract or design specifications to be done off-site.[13] In protesting the general contractor's decision

[9]386 U.S. at 639 n. 34.

[10]421 U.S. at 628-632.

[11]*Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine and General Pipefitters of New York and Vicinity, Local Union No. 638 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO v. National Labor Relations Board*, 521 F.2d 885 (D.C. Cir. 1975).

[12]29 U.S.C. § 158(e).

[13]386 U.S. at 616.

to purchase premachined doors instead of "blanks" for job-site machining, the union was attempting to preserve work open to its members when the contractor reached a business agreement with the owner. In contrast, in the instant fact situation, the work protested by Respondent was, at all times, intended to be done off-site. Thus, Respondent's action becomes no more than a product boycott and clearly prohibited by Section 8(e).[14] Furthermore, as stated by Justice Stewart in his dissent in *National Woodwork*, reliance on the *Fibreboard* case[15] to support the type of "work preservation" attempted in *National Woodwork* or the instant one

> Is wholly misplaced . . . . An employer's decision as to products he wishes to buy presents entirely different issues [than his decision to contract out work, in the plant, *now* being done by his employees]. That decision has traditionally been regarded as one within management's discretion and Fibreboard does not indicate that it is a mandatory subject of collective bargaining, much less a permissible basis for a product boycott made illegal by federal labor law.

Id. at 386 U.S. at 662.

Thus, when this Court's decisions in *National Woodwork* and *Connell* are read together with the aforementioned legislative history of the construction industry proviso to Section 8(e), it must be concluded that if there is any vitality left to the proviso's protection of "work preservation" clauses, it cannot be extended to work to be done away from the job site

[14]*See* note 6 *supra*.

[15]*Fibreboard Paper Products Corp. v. National Labor Relations Board*, 379 U.S. 203 (1964).

pursuant to contractual arrangements between the prospective employers and owners prior to commencement of an employer's work at the site or as the result of the architect's design specifications for the project. To hold otherwise would be to permit product boycotts in direct contravention of the statutory language and the expressed legislative intent.

II.

THE "WORK PRESERVATION" CLAUSE HELD LAWFUL BELOW ILLEGALLY RESTRAINS COMMERCE IN VIOLATION OF THE ANTITRUST LAWS

The agreement approved by the majority below is not only in violation of Section 8(e) but it also contravenes the purpose and intent of the national policy in favor of competition embodied in the federal antitrust laws.[16] The Respondent has sought to acquire new work at the sacrifice of overall efficiency. This Court in *Connell* held that such a result was not consistent with the goals of national labor policy when it said:

> Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the anti-trust laws strive to protect.

[16]The Court has emphasized that the antitrust laws constitute a "fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). The Court's view as to the purpose of the Sherman Act, 15 U.S.C. § 1 *et seq.*, was succinctly stated in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958): "the policy unequivocally laid down by the Act is competition." *Id.* at 4-5.

Id. at 623.

There has been increasing concern regarding the impact of private contractual[17] restrictions on economic efficiency, including their impact on the use of the most efficient available technology in the construction industry. It is clear that the "work preservation" clause at issue here does constitute a direct restraint on the business market.[18] To validate the threat or enforcement of a boycott by employees or unions representing them, under a "work preservation" clause of the type at issue here, would operate to deter subcontractors from bidding on projects with specifications which include pre-fabricated components, and thus discourage the use of pre-fabricated goods. This was recognized by the Administrative Law Judge[19] and accepted by the Board. As significant cost savings may be expected with the

[17]*See* BNA Antitrust & Trade Regulation Report No. 758 at A-8 (April 6, 1976), noting the concern of the Federal Trade Commission's Office of Policy Planning and Evaluation regarding this area.

[18]*See Enterprise Association*, 521 F.2d at 896 n. 25, where the majority approvingly quotes the statement of the Administrative Law Judge that: "If prepaid [sic] units cannot be installed . . . Austin and other contractors will not specify their purchase and use in buildings." This effect is explicitly recognized by both the concurrence, 521 F.2d at 905 (Bazelon, J., concurring), and the dissent, 521 F.2d at 929 (MacKinnon, J., dissenting). Justice Stewart has previously noted that the "restraint on the free flow of goods in commerce" resulting from work preservation product boycotts "is direct and pervasive." *National Woodwork*, 386 U.S. at 656 (Stewart, J., dissenting).

[19]*See Enterprise Association*, 521 F.2d at 930 n. 56 (MacKinnon, J., dissenting).

wider use of pre-fabricated components in construction,[20] the effect of allowing private contractual arrangements to prevent the use of such components is to artificially increase the cost of finished construction to consumers. Moreover, the result is to prevent the access of Slant/Fin's products to all union construction projects. *See Allen-Bradley Co. v. IBEW, Local 3*, 325 U.S. 797 (1945).

In addition to forcing artificially high prices to be charged for finished construction by foreclosing the use of pre-fabricated components, with their attendant economies of scale, such private contractual arrangements also serve to stifle innovation in construction methodology. In a detailed study on the economics of the construction industry, one economist observed that:

> The major factors affecting the efficiency of organization in construction are shown to be of institutional nature. Consequently, the industry's performance is adversely affected by [among other factors] the prevalence of building code and labor union restrictions on innovations.[21]

Other commentators as well have noted the adverse impact "work preservation" claims have upon the nation's housing market and upon technological innovations in production methods. *See, e.g.*, Brinker & Taylor, *The Secondary Boycott Maze*, 25 Lab. L.J. 418, 427 (1974).

The majority below contends that to focus upon the effects on the general contractor is "to ignore the

[20]P. Cassimatis, *Economics of the Construction Industry* 110 (1969).

[21]*Id.* at 126.

realities of this labor conflict". Instead, the majority below characterizes the harm in the instant case as a "blatant violation of [the subcontractor's employees'] contractual rights". 521 F.2d at 895. Whatever rights or liabilities may flow from such a private contractual restriction, it is clear that the existence of such a combination between a union and a non-labor group cannot serve to insulate the agreement from the impact of the antitrust laws when substantial anticompetitive effects are the result. A focus on the competitive effects on the business market – as is mandated by *Connell*, 421 U.S. at 625 – indicates that the "realities" of such an agreement are to preclude or hinder modernization, innovation, and the use of more efficient construction techniques, with the ultimate effect of increasing the price of finished construction for all consumers. These realities are clearly recognized by the dissent, which explicitly observes that such an agreement would "discourage the use of prefabricated goods," 521 F.2d at 929 (MacKinnon, J., dissenting), with the ultimate effect of "increas[ing] the costs of construction projects suited to pre-prepared components." *Id.* at 941 (MacKinnon, J., dissenting).[22]

The suggestion by the majority below that the subcontractor with whom the agreement was made, Hudik-Ross, might have attempted to "negotiate a compromise with the union under which the union would have agreed to install the climate control units in exchange for extra pay or other special benefits," 521

[22]It should be noted that "prefabrication appears to be particularly suitable in house construction," the area of most serious and immediate impact upon consumers. P. Cassimatis, *supra* note 20 at 111.

F.2d at 899, illustrates the majority's misconception of the anticompetitive effects of the agreement. Whatever the impact of such an arrangement for compensatory payments to the union on breach of contract questions, the impact on competition would remain the same – higher prices than necessary to consumers for finished construction, as the cost-savings from more efficient construction methodology and economies of scale would still not be passed on to consumers.[23]

This Court has mandated in *Connell* that the actual and potential anticompetitive effects of direct restraints on the business market resulting from agreements between union and non-labor parties must be closely scrutinized as to whether the practice is exempt from the Sherman Act's prohibition of restraints of trade. *Connell* was the first decision to clearly distinguish the "statutory" exemption from the operation of the antitrust laws conferred by Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and by the Norris-LaGuardia Act, 29 U.S.C. § § 104, 105, and 113, from a "nonstatutory" exemption said to be derived from a proper judicial accommodation of labor and antitrust policies. *See* 421 U.S. at 621-22, clarifying the discussions of such an exemption in *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965).

[23]Similarly, the majority's suggestion that the subcontractor simply not bid at all on projects calling for the use of prefabricated components, *Enterprise Association*, 521 F.2d at 895, would result in the freezing of industry work arrangements to those currently practiced, to the detriment of all owners and occupiers of finished construction. *See also id.* at 928 (MacKinnon, J., dissenting).

As regards the nonstatutory exemption, a balancing test is clearly contemplated. Unlike previous cases, which had concentrated on the intent of the parties, *Connell* looked to the *competitive effects* of the arrangement and not to the motivation for it.[24] The anticompetitive effects of the agreement proscribed in *Connell* are similar to those which flow from the practice upheld by the majority below. In *Connell*, this Court found that the agreement did far more than eliminate competition over wages and working conditions; its effect would be to foreclose from the market all non-union contractors, including more efficient ones, whether or not they met union standards for wages and working conditions. *Connell*, 421 U.S. at 623. *See The Supreme Court – 1974 Term*, 89 Harv. L. Rev. 47, 236-37 (1975). The practice upheld by the majority below would similarly produce serious anti-competitive effects, restricting the use of the most efficient available technology and leading to the foreclosure of prefabricated components from the

[24]The essence of the Court's analysis appears to be contained in the following passage:

> This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible. . . . But the methods the union chose are not immune from antitrust sanctions simply because the goal is legal. . . . This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

Id. at 625.

construction market. *Enterprise Association*, 521 F.2d at 929 (MacKinnon, J., dissenting). In effect, the planner of a construction project would find his freedom to contract for construction employers, materials, and components severely curtailed.

A reversal of the decision below would not only harmonize antitrust policy and labor policy in consonance with the dictates of *Connell*,[25] but would also comport with the recent series of decisions by this Court which have re-emphasized the importance of antitrust policy in a wide-range of regulated industries.[26] Moreover, a failure to invoke the protections and sanctions of the antitrust laws in the case at bar will result in the continued application of outmoded technology and the imposition of the *status quo* on construction techniques and materials, with a concomitant adverse effect on the nation's economy.

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[25]It should be pointed out that the majority below ignores the impact of antitrust policy generally and *Connell* in particular. *Connell* is cited only once in the course of an exhaustive majority opinion. *See Enterprise Association*, 521 F.2d at 898 n. 29. *Cf. National Woodwork*, 386 U.S. at 655-58 (Stewart, J., dissenting).

[26]*See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973); *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747 (1973). *See generally* Robinson, *Antitrust Developments: 1973*, 74 Colum. L. Rev. 163, 163-79 (1974). In addition, commentators have forcefully argued that, as a result of social and legislative changes since the passage of the Clayton Act and the Norris LaGuardia Act, there is a strong case for the application of the antitrust laws to certain union activities. *See* Siegel, Connolly & Walker, *The Antitrust Exemption for Labor – Magna Carta or Carte Blanche?*, 13 Duquesne L. Rev. 411, 466-80 (1975).

CONCLUSION

For all of the foregoing reasons, the Court is urged to reverse the decision of the Court below.

Respectfully submitted,

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